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IN THE

# Supreme Court of the United States

OCTOBER TERM 1946

No. 1231

PHILIP FRIED and GEORGE NEARY,
*Petitioners,*

against

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

J. BERTRAM WEGMAN,
*Counsel for Petitioners.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully represent:

### A

### Summary Statement of the Matter Involved

Petitioners applied to the United States District Court for the Southern District of New York for an order (1) directing the return and suppression of books and records

unconstitutionally seized, and (2) directing the suppression as evidence of confessions illegally obtained. The District Court, after hearing testimony, filed an opinion, and denied the application insofar as it was for the return and suppression of the books and records. It dismissed the application insofar as it was for the suppression of confessions, as premature. No indictment of petitioners has been filed.

Petitioners appealed to the Circuit Court of Appeals for the Second Circuit. On February 25, 1947, the Circuit Court of Appeals filed its opinion and judgment by which (one judge dissenting) it reversed the determination of the District Court regarding the application to suppress confessions, and remanded the matter for further proceedings. However, it affirmed the decision of the District Court insofar as it related to the searches and seizures, with the following statement:

> "Substantial testimony, the credibility of which was, of course, for the district judge to determine, sustains his conclusion that such authorized voluntary consent was given to the searches as to validate them and the seizures."

Petitioners filed a petition in the said Circuit Court of Appeals in due course on March 11, 1947, praying for a rehearing insofar as the District Court's decision had been affirmed. This petition was denied on March 12, 1947.

The facts may be briefly stated as follows: On August 21, 1946, a complaint was laid before a United States Commissioner by a Special Agent of the Federal Bureau of Investigation, which alleged that petitioners were guilty of illegal possession of rubber stolen from foreign commerce. The complaint stated that its allegations were made "upon information and belief" and that "the sources of deponent's information and the grounds of his belief are an investigation conducted by him in the course of his

official duties" (R. 219-220). It is set forth at length in the Circuit Court of Appeals' statement of the case preceding its opinion. A warrant to arrest was issued by the Commissioner upon this complaint, on that day, August 21, 1946.

Petitioner Philip Fried operated a rubber cement plant under the registered trade name of Special Formula Chemical Co. at 400 West 219th Street, New York City (R. 46). A portion of the premises was used for the manufacture of the cement; another portion consisted of offices (R. 49). Petitioner George Neary (Nierenberg) was the sales manager of the company (R. 46).

At 4:30 P. M. on September 17, 1946, fifteen armed FBI Agents entered the above premises through various entrances and arrested Neary and three other employees upon the above warrant (R. 122-124). Fried was absent. Two agents immediately left (R. 124), and apprehended Fried at his home a half hour later, and took him to the FBI office (R. 4-5).

Neary's person was twice searched for weapons by different agents immediately following his arrest (R. 157, 171). He asked the agents if he could use the telephone and call a lawyer, but permission was refused (R. 52).

He was then asked by the agent in charge, Cox, "What is your attitude to us making these arrests in this plant and possibly examining the premises?" According to Agent Cox, Neary replied, "We have nothing to conceal here and I want you to search the plant and find that out for yourself" (R. 125).

There ensued a thorough search of the manufacturing portion of the premises, which took about one hour (R. 126). Neary accompanied the agents upon this search, in which nothing was found except some rubber which turned out not to be stolen (R. 144).

During this search, and while Neary was away from the office portion of the premises, other agents interviewed the company's bookkeeper and required her to produce from

the safe the purchase book and examined the contents thereof (R. 184, 191).

Upon the agents' return with Neary from the factory portion to the office portion of the building, they produced a printed "consent to search," which they explained gave them authority to take anything they desired, and asked Neary to sign it, explaining (they say) that he did not have to sign. He signed it (R. 161-162).

There ensued a thorough search of the offices, lasting three-quarters of an hour, and resulting in the seizure of most of the books of account and records of the company (R. 181-182, 132).

At about 7.30 P. M., the agents removed Neary to the FBI offices (R. 164) where he and Fried (and four employees) remained in the custody of the FBI, being interrogated until 5 A. M. the next morning, and, after a brief interval for sleep, until 2 o'clock in the afternoon, when they were arraigned before the Commissioner (R. 14-16). During this interval, on the morning of September 18th, other FBI agents returned to petitioners' premises, required the bookkeeper to produce certain other books of the company and took them to the FBI offices (R. 116-117).

Neary contradicted the agents' testimony that he invited them to search the plant, and that he consented willingly to the seizure of the books and records (R. 53, 55, 75, 76, 57). He said he had signed the "consent to search" only after the search had been concluded, and then by reason of fear, and ignorance of his rights (R. 59, 92-93).

There was testimony that in June, 1946, FBI agents, who had been inspecting the establishments of several rubber consumers, seeking to locate the stolen rubber, had so informed Philip Fried, and had requested and obtained from him permission to inspect his plant for that purpose at that time, and had done so, Fried telling them then "the plant was open for inspection at any time" (R. 120-121). No stolen rubber was found that time either (R. 139).

The District Court's finding regarding the seizure of September 17th was:

> "That neither fear nor submissiveness induced the undenied consent, but that experience and a motive to give the appearance of innocence, in the security in which he believed himself to be, combined to induce Nierenberg to give actual and voluntary consent to the search" (R. 224).

FBI Agent Cox gave the following significant testimony: When he left the FBI office on September 17, 1946, to arrest the petitioners, he intended, if possible, again to look for the stolen rubber at the plant; he thought the rubber might be there and that is why he went there; he brought with him the printed form of the "consent to search" (R. 138-139); he selected the date for the raid and the time of day (R. 142); his failure to ask Neary to sign the "consent" until after the plant had already been searched, was not accidental but was deliberate (R. 145); having, as he thought, found some of the rubber, he was determined to have the "consent" signed before seizing any records (R. 149); he never explained to Neary that he had a right not to have the place searched, nor was Neary advised of his constitutional rights in that connection (R. 145-146).

## B

## Jurisdictional Statement

The jurisdiction of this Court is invoked under Title 28 U. S. C. Section 347(a); Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925; and Rule 37(b) of the Rules of Criminal Procedure effective March 21, 1946.

This Court by order of March 25, 1947, extended petitioners' time to apply for a writ of certiorari until April 11, 1947.

## C

### The Questions Presented Are:

The principal question presented is:

1. Whether Federal officers having arrested a layman upon an unconstitutional warrant, and thereby deprived him of his liberty without due process, and having also deprived him of a demanded right to counsel, may secure from him a valid waiver of the constitutional immunity against unreasonable searches and seizures.

Subsidiary questions presented are:

2. Whether an employee, by an application of the doctrine of implied agency, may be held to have waived his principal's immunity against unreasonable seizures, when the principal is illegally in the custody of Federal officers at the time but his personal waiver is not solicited by them, and was not obtained.

3. Whether federal seizure of a business record may be justified by a consent solicited and given *after* the officers have first examined the contents of the record without any permission.

4. Whether a consent to search given to arresting officers will justify a subsequent search and seizure made the following day by other officers while the arrested person is elsewhere in custody.

## D

### Reasons Relied Upon for the Allowance of the Writ

The District Court held, and the Circuit Court of Appeals affirmed the decision, that the warrant upon which petitioners were arrested was issued in violation of the

law and the Constitution, and that the arrests were illegal, and not in any way justifiable.

The uncontradicted evidence also showed that the petitioner Neary's request to consult a lawyer was refused.

Nevertheless, it was held below that under these circumstances the arresting officers secured from Neary a valid waiver of the constitutional right against unreasonable searches and seizures. This is a novel ruling in constitutional law. No similar case has been found. The decision is not in harmony with this Court's decision in *Amos* v. *United States*, 255 U. S. 313, wherein it was held that Government officers wrongfully acting under color of right could not obtain from the person subjected to this false show of authority an effective waiver of his right against unconstitutional seizures.

It also conflicts with the principle laid down by this Court in *McNabb* v. *United States*, 318 U. S. 322, that federal agents may not obtain a valid confession by violating a federal statute. In this case, it has been held that they may obtain a valid waiver of one constitutional right by violating several other constitutional rights. "The Constitution does not thus nullify its own terms, setting them at war with each other." *Malinski* v. *New York*, 324 U. S. 401, 423.

Nor can the decision be reconciled with the decision of the same Circuit Court of Appeals in *United States* v. *Heitner*, 149 Fed. (2d) 105, cert. den. 90 L. Ed. (Adv. Op.) 39 that an illegal arrest will render incompetent a voluntary admission made by the arrested person, or with the similar decision of the Court of Appeals for the District of Columbia in *Nueslein* v. *Dist. of Col.*, 115 Fed. (2d) 690.

It is no exaggeration to say that the doctrine now enunciated by the Court below opens the door to the police methods of totalitarian states. The terrifying efficiency of such methods and the logical result of the doctrine are here apparent. An unjustifiable arrest followed by unconstitutional custody *incommunicado* can be expected to result in subsequent alleged "waivers" of rights, and "voluntary" confessions. All that is then needed is an easy

complaisance by the courts in any plausible tale later told by the police officers to eliminate the last vestiges of constitutional safeguards against oppression.

The Court below has also here held that federal officers, having both a principal and his agent in their custody, may resort to the agent for a waiver of the principal's constitutional rights, and thereafter justify such waiver as authorized by an implied agency, although at the time of eliciting the waiver, they avoided ascertaining the principal's disposition concerning it. It is a fair inference that at the time of the search, the officers were not sanguine concerning the "authorization", which the Court below infers to have existed. This is a doubtful extension of the law of agency into the field of guaranteed constitutional immunities which should be reviewed. It has not been decided by this Court, the question having been left open in *Amos* v. *United States*, 255 U. S. 313, a less extreme situation, since there the principal was not available.

WHEREFORE, petitioners pray that a writ of certiorari may issue out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of the record and all proceedings had herein; and that the order of the said United States Circuit Court of Appeals insofar as it affirmed the District Court's order in this case may be reversed, and that petitioners may have such other relief as this Court may deem appropriate.

Dated: New York, New York, April 10, 1947.

PHILIP FRIED,
GEORGE NEARY,
Petitioners,

By J. BERTRAM WEGMAN,
Counsel for Petitioners.

IN THE

# Supreme Court of the United States

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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### Opinion Below

The Court below rendered an opinion, a certified copy of which is annexed to the record submitted herewith. The opinion is not yet officially reported.

### Jurisdiction

The judgment affirming in part the decision of the District Court was handed down on February 25, 1947.

The decision denying the petition for rehearing was handed down on March 12, 1947.

This Court's order extending, until April 11, 1947, petitioners' time to apply for a writ of certiorari is dated March 25, 1947.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; Section 347(a), Title 28, U. S. C.; and Rule 37(b) of the Rules of Criminal Procedure effective March 21, 1946.

## Statement

The factual situation disclosed by the FBI agents' testimony, which was accepted by the District Court, may be summarized as follows: The agents' principal purpose in raiding the plant September 17, 1946, was to make a search and seizure; the arrests were merely incidental to this purpose. Under color of the authority of an invalid arrest warrant, issued some three weeks before, they gained entrance to the premises and arrested Neary. They searched his person; he asked permission to call a lawyer, which was refused. After subjection to this false show of authority, Neary, an employee, invited a search "of the plant". During the ensuing search of the plant, the owner himself was illegally apprehended at home. Although he was in the custody of the FBI, the owner's consent to the subsequent seizure of his business records was not solicited, nor was he told what was about to take place. Instead, the employee, Neary, was asked to sign a consent to the search and seizure of Fried's records. Neary was not requested to sign such a consent until *after* the agents had already secured from the bookkeeper the principal record, the purchase book, and examined it in Neary's absence. Upon the following morning, both the owner and the employee being illegally in custody and absent being interrogated, and no request for permission being made to either, the agents took additional records apparently overlooked the previous night.

## Statute Involved

Section 300(a), Title 5, U. S. C.:

"Sec. 300a. Federal Bureau of Investigation; authority of officers to serve warrants and make arrests; authority to carry arms.

The Director, Assistant Directors, agents, and inspectors of the Federal Bureau of Investigation of the Department of Justice are empowered to serve warrants and subpoenas issued under the authority of the United States; to make seizures under warrant for violation of the laws of the United States; to make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer. Such members of the Federal Bureau of Investigation of the Department of Justice are authorized and empowered to carry firearms. June 18, 1934, c. 595, 48 Stat. 1008; Mar. 22, 1935, c. 39, Title II, 49 Stat. 77."

## Specification of Errors Assigned

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding that a valid waiver of the right against unconstitutional seizures may be obtained from a layman illegally arrested and deprived of a demanded right to counsel.

2. In holding that a valid waiver of a principal's constitutional right against unreasonable searches may be obtained from his agent, without the principal's knowledge,

by Government officers who have both principal and agent in their custody.

3. In holding that federal officers, after wrongfully examining a book, may utilize the knowledge so obtained to secure a consent which will justify its subsequent seizure.

4. In holding that a consent given at the time of arrest to a search of the premises where the arrest takes place will justify a second search thereof on the succeeding day.

## POINT I

**A valid waiver of the immunity against unreasonable seizures may not be secured from one unconstitutionally arrested and deprived of the demanded right to counsel.**

1. *The Illegal Arrest.* The District Court properly concluded that the arrest of petitioners was illegal (R. 219-221). The Circuit Court of Appeals reproduced this portion of the District Court's opinion in its statement of the case, with apparent approval thereof. The arrest warrant was issued upon a complaint, the allegations of which were said to be "upon information and belief", and the sources of this information and belief were not disclosed, except by the generalization that they were "an investigation conducted [by the FBI agent] in the course of his official duties". Such a complaint will not support a warrant. *Go-Bart Co.* v. *United States,* 1930, 282 U. S. 344; *United States* v. *Ruroede,* 220 Fed. 210; *United States* v. *McCunn,* 40 F. (2d) 295; *United States ex rel. King* v. *Gokey,* 32 F. (2d) 793; *United States* v. *Pollock,* 64 Fed. Supp. 554; *People* v. *Taylor,* 159 Misc. (N. Y.) 536. It offends against the provision of the Fourth Amendment that "no warrants shall issue, but upon probable cause * * *." Here the determination as to the existence of "probable cause" was necessarily made by the police officer, and not by the magistrate.

Nor could the arrests be justified, independently of the warrant, as made upon reasonable grounds to believe a felony had been committed. For the statute governing arrests by FBI agents provides that arrests without warrant may only be made by them "where there is a likelihood of the person escaping before a warrant can be obtained for his arrest * * *". Title 5, U. S. C., Sec. 300a; *United States* v. *Haberkorn,* 149 F. (2d) 720 (C. C. A. 2, 1945); cf. *Gooch* v. *United States,* 82 F. (2d) 534, 538 (C. C. A. 10, 1936). The District Court found that there was no evidence of any such likelihood (R. 221). It therefore excluded as irrelevant any interrogation of the agents by the petitioners to ascertain whether they had any reasonable grounds to believe petitioners guilty of a felony (R. 140).

Having been illegally arrested, the petitioners were being deprived of their liberty without due process of law, in violation of the Fifth Amendment. Cf. *Bell* v. *Hood,* 90 L. Ed. (Adv. Op.) 758.

The District Court's consideration of the illegality of the arrest (and, so far as appears, the Circuit Court of Appeals') was prompted by the erroneous belief that the seizures might have been justified as incidental to a lawful arrest, if the arrest had proved to be lawful. But even if the arrest had been lawful, it would only have justified the seizure of the "instrumentalities of crime", in this case, the stolen rubber. It would not have conferred the right to seize that for which a search warrant could not have been obtained. *Lefkowitz* v. *United States,* 285 U. S. 452, 467. And see Rule 41(b), Rules of Criminal Procedure, which authorizes the issuance of a search warrant only for property "stolen or embezzled in violation of the laws of the United States; or designed or intended for use or which is or has been used as the means of committing a criminal offense". Such a characterization scarcely fits the books of account of a legitimate business.

Thus the Courts below appear to have misconceived the true significance of the illegal arrest, viz., its bearing upon the validity of the consent resorted to as justification for the seizures.

2. *The Denial of Counsel.* When arrested, Neary asked the agents if he could use the telephone and call a lawyer, but permission was refused. This is mentioned in the Circuit Court of Appeals' statement of the case as one of the uncontroverted allegations in the affidavits originally filed. Neary's testimony to that effect at the hearing was also not controverted, although nine of the agents either testified or filed affidavits. The likelihood that such a request was made is emphasized by agent Cox's testimony that as they were leaving the premises, when the search was completed, Neary asked a fellow employee, who had not been arrested, to get in touch with his attorney (R. 135, and see R. 205).

The refusal of the request to telephone a lawyer preceded the alleged invitation to search the plant, and the consent to the seizure of the books. May officers who intend to solicit a waiver of a constitutional right effectively smooth the path to this objective by denying the assistance of counsel to the one who is to make this weighty decision? The Sixth Amendment gives the right to the accused to have the assistance of counsel for his defense. This right is not limited to proceedings after indictment. In so holding in *People ex rel. Burgess* v. *Riseley* (1883), 13 Abb. N. C. 186, 1 N. Y. Crim. Rep. 492, the Court said that: "To give life and effect, therefore, to the provision of the Constitution, it must be held to confer upon the relator every privilege which will make the presence of counsel upon the trial a valuable right * * *. He has rights even before indictment. He may claim, perhaps, that detention is illegal * * *." And in *Wood* v. *United States*, 128 Fed. (2d) 265, 271 (App. D. C., 1942), it was said that: "The aid of counsel in preparation would be farcical if the case could be foreclosed by preliminary inquisition which would

squeeze out conviction or prejudice by means unconstitutional if used at the trial." If an illegally arrested layman can be procured validly to waive his immunity against unconstitutional seizures, after having demanded and been refused advice of counsel, the subsequent assistance of counsel at his trial will be merely illusory.

The District Court thought the waiver valid, because Neary was "a citizen of substance and means * * * a man of affairs * * *". But this Court has noted in *Powell* v. *Alabama*, 287 U. S. 45, 69, and in *Williams* v. *Kaiser*, 323 U. S. 471, 475, that "Even the intelligent and educated layman has small and sometimes no skill in the science of law * * *" and "requires the guiding hand of counsel at every step in the proceedings against him". The Court below seems to have indulged in the "nice calculation" as to the amount of prejudice arising from the denial of counsel, which was forbidden in *Glasser* v. *United States*, 315 U. S. 60, 76.

3. *The Waiver of Constitutional Immunity.* If this Court found it necessary to consider in *Adams* v. *United States*, 317 U. S. 269, whether a layman who had *waived* his right to counsel could thereafter validly waive his right to jury trial, how much more necessary is review of the doctrine now enunciated by the Court below, that a valid waiver of his immunity against unreasonable seizures may be obtained from a layman *deprived* of counsel, and unconstitutionally arrested? If the confessions in *McNabb* v. *United States*, 318 U. S. 322, were vitiated because obtained by means of FBI agents violating the statute governing them, how can the waiver of a constitutional immunity be sustained which is obtained by wholesale disregard of other constitutional limitations?

The Circuit Court of Appeals had held in *United States* v. *Heitner*, 149 Fed. (2d) 105 (C. C. A. 2, 1945), cert. den. 90 L. Ed. (Adv. Op.) 39, that it was an inevitable inference that an admission made after arrest resulted therefrom, in the sense that the prisoner would not have answered

the questions, had he had not been in custody. Whence it was said that the illegality of the arrest became relevant to the competence of the evidence. But Neary's consent to the seizure of the books resulted just as inevitably from his arrest. There would have been no occasion for his alleged "motive to give the appearance of innocence" were it not for the "lawless invasion of the premises" by the agents. *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 358.

## POINT II

### Additional reasons invalidating the seizures.

1. *Waiver of Constitutional Immunity by an Agent.* The justification for the seizure of Fried's books and records in violation of his constitutional immunity is a consent or waiver of such immunity by his employee Neary. The Government maintained in the Court below that Fried and Neary were partners, but neither the District Court nor the Circuit Court of Appeals so found. The District Court applied the doctrine of implied agency, finding from the evidence that Neary, the manager, was "authorized" to waive Fried's immunity. This Court in *Amos* v. *United States,* 255 U. S. 313, left open the question whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, as unnecessary to its decision, because her consent had been obtained by Government officers illegally acting under color of right. The Court below disregarded the holding of that case, and went on to decide the question left open. Here the circumstances militating against the application of the doctrine of implied agency are particularly strong, for the justification of necessity does not exist. Fried was in the FBI's custody, but they avoided asking him for the waiver, evidently preferring to secure it from his employee. Surely the officers may not thus deliberately re-

frain from ascertaining the principal's disposition, and then seek to justify the agent's act as impliedly authorized by him. The Courts must indulge every presumption against the waiver of constitutional rights. *Johnson* v. *Zerbst,* 304 U. S. 458, 464; *Aetna Insurance Co.* v. *Kennedy,* 301 U. S. 389, 393.

2. *An Illegal Search Preceded the Alleged Consent.* Neary, the agent said, invited him to "search the plant" (R. 125). Such a search for rubber was made, but the agents clearly did not consider this an invitation to examine or take the books and records of the company, for the agent in charge says he made no search of the documents in the company office until obtaining the later written consent from Neary (R. 131, 149). But the other agents testified that during the search of the manufacturing portion of the premises, and prior to the execution of the written consent, they had examined the purchase book of the company and questioned the bookkeeper concerning it (R. 184, 191). This was done in the office portion of the premises while Neary was accompanying the agent in charge on his search of the factory. That Neary subsequently signed a consent to search and seize *in futuro* did not correct the wrongful examination of the book which had already taken place. The knowledge of the agents that it would be advisable to secure a consent to the seizure of the book obviously stemmed from the previous examination of the book. Cf. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385.

3. *The Alleged Consent Did Not Justify a Second Search and Seizure on the Following Day.* Other agents came on the following morning, September 18th, Fried and Neary both being illegally in custody in the Federal Jail, and took additional books from the plant. The Circuit Court of Appeals held that this seizure also was justified by the consent obtained the previous day from Neary. Apart from the fact that this interpretation of

the consent is contrary to its express terms (Government's Exhibit 1, R. 212, offered R. 99), for it only purported to authorize a search at the time of arrest by two named agents, it is a patently dangerous doctrine to hold that a consent given by an arrested person at the time of his arrest to search the premises where the arrest occurs opens those premises to repeated searches by Government agents for an indefinite length of time thereafter. In that case, there would be no way to determine when, if ever, the petitioner would regain his constitutional immunity with respect to those premises. Cf. *Weeks* v. *United States*, 232 U. S. 383, holding that the right to search incidental to a lawful arrest does not continue past the time of its justification.

## CONCLUSION

**For the above reasons, the writ of certiorari should be granted.**

Respectfully submitted,

J. Bertram Wegman,
Counsel for Petitioners.

Richard J. Burke,
of Counsel.